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UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

BELLAGIO, LLC Employer, and INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 501, Petitioner.	Case No.: 28-RC-154081 **OPPOSITIOIN TO EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

I. INTRODUCTION

This opposition to the Request for Review filed by the Bellagio ('Employer") is submitted on behalf of the International Union of Operating Engineers Local 501 ("Petitioner"). The Employer's Request for Review is based upon its contention that the Petitioner's failure to include in its petition a statement that the Employer declined to recognize it, is somehow fatal to the petition and requires the filing of an amendment thereto.

The Employer also contends that the petition for bargaining unit comprised of some three Surveillance Technician employees is inappropriate because the subject employees are either guards or confidential employees within the meaning of the Act.

Petitioner contends that none of the issues raised by the Employer warrant the granting of a Request for Review in this matter and therefore contend that the Employer's Request for Review be dismissed.

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II. STATEMENT OF FACTS

The Petitioner adopts the statement of facts as set out in the Regional Director's Decision and Direction of Election. It is noted however that the Employer nowhere specifically argues that any particular finding of fact by the Regional Director was unsupported by the evidence.

III. ARGUMENT

A. The Failure of the Petitioner to Declare on the Petition Form That the Employer Declined to Recognize it Requires No Amended Petition Nor Caused Any Harm to Anyone

Section 102.67(d) of the Board's rules requires the following:

"The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of:

(i) The absence of; or

(ii) A departure from, officially reported Board precedent.

(2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the right of a party.

(3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy."

The Petitioner contends that the Employer here has made no argument which implicates any of the above-listed criteria. The Employer merely contends that Section 102.61(a) of the Board's rules requires that the petition contain a statement that the Employer declines to recognize the Petitioner. The Petitioner's failure to include such information on the petition itself is of absolutely no consequent to the Employer or any other

party. The Employer nowhere argues that had a request for recognition been made to the Employer and such information was included in the petition, the Employers' rights or options would be different then they are now. Certainly once the Employer was served with the petition it was clearly on notice that the Petitioner was seeking recognition. If this Employer had any desire to recognize the Petitioner nothing stopped it from doing so – including up until the present time.

Conversely if the Employer gets is way and the Petitioner is required to file an amended petition to what end will the Employer put this action? It will be an exact same legal posture it is now. Nothing whatsoever will have changed. Because this is undeniably true, the Employer nowhere contends that the failure of the union to state on the petition that Employer declined to recognize it had any consequence whatsoever. Rather it is apparent that the Employer seeks to engage in the exact type of behavior that the Board has sought to avoid. Advanced Pattern Co., 80 N.L.R.B. 29, 31-38 (1948), cited by and relied upon by the Regional Director in his Decision and Direction of Election, stands to resist efforts to reduce national labor policy to a game where, "[a]ll sides will be quick to seize upon technical defects in pleadings to gain substantive victories."

Here the Employer seeks to do precisely that because its vigorous attempt to vindicate the right to have a petition state an employer has declined to recognize a union, provides it with nothing other than an opportunity to seize a substantive victory from a technical defect.

If the Petitioners' omission actually caused some detriment to the Employer one would expect it to say so somewhere in its thirty-nine pages of argument. Because the Employer cannot even attempt an argument that the failure of the petition to note a denial of recognition mattered at all, it redresses its argument in three sets of the same clothes – mandatory language, arbitrary and capricious and due process. However each of these arguments at the end is the same since they all seek to reduce the harmless acts of the Petitioner to a deprivation but nothing was deprived. The law does not and should not provide redress for actions that cause no harm.

In any event the Employer has failed to raise, much less convince, that its contentions fall within any part of section 102.67(d).The Employer also nowhere claims that its issue, that caused no harm to anyone, somehow arises to a compelling reason because there is a "substantial question of law or policy" because of the absence or departure from officially reported Board precedent. No departure from any specific Board decision is present nor is there a lack of case law. The Employer does not contend it was prejudiced by any clearly erroneous finding of fact nor by the manner of the conduct of the hearing. Finally it fails to expressly seek reconsideration of a Board rule or policy. Hence the Request for Review fails to implicate any of the listed grounds for granting a request for review and should be denied.

B. <u>Surveillance Technicians Are Not Guards Within the Meaning of the Act</u>

The Employer next contends that the Surveillance Technicians are guards within the meaning of the Act but again makes no argument under Rule 102.67(d) "Grounds for Review". For example nowhere does Employer argue the existence of compelling reasons for review, that a substantial question of law or policy is raised because of the absence of or departure from officially Board reported president or that the Regional Director's decision on a factual issue is clearly erroneous or finally that there was some error with respect to the conduct of the hearing which prejudicially effected the Employer's rights.

Rather, the Employer claims that its Surveillance Technician employees are guards within the meaning of the Act and prior Board precedent. Indeed rather than even attempting to comply with the Board's rules regarding requests for review the Employer merely states,

> "The Regional Director's conclusion that Respondent failed to show that Surveillance Technicians enforce rules to protect property from employees or patrons is wrong and reflects a myopic understanding of the facts."

It is manifest that the Employer disagrees with the Regional Director but once again fails to articulate any reason consistent with section 102.67(d) that review should be granted.

In its argument Employer attempts to blur the distinction between clear and separate job classifications and corresponding job functions. In this regard it attempts to portray the Surveillance Technicians as fungible security department employees who are protecting property. Rather the undisputed facts show that the Surveillance Technicians are responsible for maintaining, repairing and relocating surveillance equipment for the Employer. The Surveillance Technician employees perform no functions typically associated with that of guards as the Board has found in a myriad of decisions over decades. The Employer tries to lump them together with Operators of the system who apparently perform duties consistent with protecting the Employers property. . The Board has previously rejected employer efforts to expand the definition of guards specifically to employees who maintain security systems but perform no guard function. Wells Fargo Alarm Servs. v. NLRB 533 F2d 121 93rd cir. 1976) The lack of any duty to enforce rules or to respond to security breaches was fatal to the attempt to transform these employees into guards.

The Employer principally relies on MGM Grand Hotel, 274 NLRB, 139 (1985) to support its claim that the Surveillance Technician are guards. However any reading of the MGM case shows that the employees there performed functions which the Board has long held to be the work of guards. But those same functions which supported a finding of guard status in MGM are lacking in the instant matter. For example there, and indeed as quoted by the Employer in its Request for Review, the Board found that the MGM Surveillance Operators employees, "served to monitor and report possible security problems and infractions and possible life endangering situations. The MGM employees , "with respect to security, the operators monitor door exit alarms, stairwell motion detectors, a watch tour system, and other systems." Hence in the MGM case the at issue employees were specifically assigned and performed the security function of physically watching exits as well as monitoring motion detectors – all with the specific purpose of physically protecting the Employer's premises and property. Like the Employers Surveillance Operators here, the

MGM employees were responsible for protecting property, unlike the Technicians who perform no such function but rather repair, maintain and relocate aspects of the system.

Because none of the duties performed by the Surveillance Technicians fall within the type of duties typically associated with guard work the Employer contends that they have access to the entire workings of the surveillance and security system and that by some undisclosed alchemy this fact alone transforms them into guards. However all the cases cited by the Employer are cases where individual employees actually performed guard duties – perhaps infrequently or not as part of their main duties – but nonetheless guard duties. Here there are no duties of record performed by Surveillance Technicians that render them guards within the meaning of the Act.

C. The Petition for Employees Are Not Confidential Employees Within the Meaning of the Act

Incredibly, the Employer after arguing that its employees are guards now argues that its employees are apparently simultaneously confidential employees within the meaning of the Act. The Employer's Request for Review cites no facts capable of supporting such a finding. Indeed the best argument that the Employer could make under the record evidence is that the employees may from time to time have access to confidential information specifically regarding investigations into employees or others, but there was no evidence that the petitioned for employees had anything other than such access. Also there was no evidence that the petitioned-for employees have access to confidential labor relations matters such as negotiating positions or expected changes.

In this argument the employer principally relies upon NLRB v. Hendricks County Rural Electric, 454 U.S. 170 (1981). However as found by the Regional Director in his Decision and Direction of Election, the *Hendricks* case provides no support whatsoever for the Employer's contention of confidential status. Indeed in *Hendricks* employees were found not to be confidential and the court reiterated the extremely narrow scope of the confidential status. It also squarely rejected the contention that mere access to some confidential information renders an employee a confidential employee within the meaning of the Act.

Because of this, the Employer argues in its brief that merely having access to some confidential information does not preclude a finding of confidential status. While this may be true it certainly is not a substitute for actual evidence that an employee falls within the test reiterated in *Hendricks* supra. The Employer had to produce facts capable of showing that an employee contended to be confidential meets the labor-nexus test requiring action within labor relations matters. Here the record is simply void of any facts capable of making any such findings in this case.

Further, and again, the Request for Review does not comport with 102.67(d) since the Regional Director applied existing case law to undisputed facts and produced a decision the Employer simply disagrees with.

IV. CONCLUSION

For the foregoing reasons the Petitioner urges the Board to deny this Request for Review.

Dated: July 21, 2015

THE MYERS LAW GROUP, A.P.C.

By: _____
Adam N. Stern

PROOF OF SERVICE

I am employed in the office of a member of the bar of the State of California at whose direction this service was made. I am over the age of 18 and not a party to the within action; my business address is 9327 Fairway View Place, Suite 100, Rancho Cucamonga, CA 91730.

On July 21, 2015, I served the foregoing document described as **OPPOSITIOIN TO EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION** by serving interested parties in this action by placing a true copy thereof in a sealed envelope, addressed as follows:

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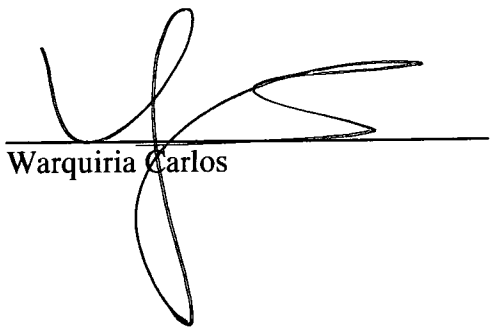
I am "readily familiar" with the firm's practice of services of process. Under that practice, this document would be deposited:

(BY EMAIL) I caused the document(s) to be sent to the person(s) at the electronic address(es) listed above. I did not receive any electronic message or indication that the transmission was unsuccessful.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 21, 2015 at Rancho Cucamonga, California.



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